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No. 89-1736

Supreme Court, U.S.
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In the Supreme Court of the United States
OCTOBER TERM, 1990

RUSSELL HOBSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether the predicate offenses underlying petitioner's RICO convictions constituted a "pattern of racketeering activity" within the meaning of the RICO statute, 18 U.S.C. 1961 *et seq.*



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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 893 F.2d 1267.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1990. The petition for a writ of certiorari was filed on May 8, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); importing marijuana, in violation of 21 U.S.C. 952(a); possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and conspiring to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to a total of 35 years' imprisonment and a \$110,000 fine. Petitioner seeks further review of a decision denying his motion for collateral relief under 28 U.S.C. 2255.

1. The evidence at trial is summarized in the opinion of the court of appeals on direct appeal and in our prior brief in opposition. *United States v. Bascaro*, 742 F.2d 1335, 1342, 1358-1359 (11th Cir. 1984), cert. denied, 472 U.S. 1017 (1985); 87-1051 Br. in Opp. 2-3. It established that co-defendants Antonio Bascaro and Manuel Villanueva directed a criminal enterprise that engaged in numerous drug smuggling ventures from late 1977 to early 1981. Petitioner was a "preferred customer[]" of the enterprise; he and co-defendant Michael Waldrop purchased marijuana from the organization on an estimated 25 to 30 separate occasions.

In January 1979, co-conspirator Clyde Cobb decided to attempt to smuggle marijuana by airplane. In mid-January, pursuant to Cobb's plan, James McDonnell flew a DC-3 to Colombia, took on a cargo of marijuana, and flew back to Fort Lauderdale. The plane and its cargo were seized by federal and local law enforcement agents at the Fort Lauderdale airport.

Two weeks later, McDonnell agreed to make a second attempt to smuggle marijuana by aircraft. Co-conspirator Patrick Waldrop had made a downpayment of \$1,500,000 to Cobb's brother-in-law. Consequently, Waldrop and petitioner expected to receive a substantial part of the planeload of marijuana. Waldrop and petitioner pressured Cobb to produce the marijuana or return the \$1,500,000. On February 13, 1979, McDonnell and two others flew to Colombia in a Lockheed Constellation and obtained 25,795 pounds of marijuana. Trucks furnished by Waldrop and petitioner were readied to meet the airplane at a clandestine landing site to take possession of most of the Constellation's cargo. On the return flight, however, fog and engine problems prevented the Constellation from landing at the clandestine site. McDonnell finally landed at an airport in Panama City, Florida, in the early morning hours of February 14, 1979. Federal agents who were waiting at the Panama City airport immediately arrested the crewmembers and seized the marijuana. Several hours after the Constellation was supposed to have arrived at the prearranged site, petitioner telephoned Cobb to ask what had happened.

2. The predicate offenses underlying petitioner's substantive RICO conviction were the importation of the marijuana aboard the Constellation and the possession of that marijuana with intent to distribute it. On direct appeal from his conviction, petitioner contended that those two offenses did not qualify as a "pattern of racketeering activity" within the meaning of the RICO statute, 18 U.S.C. 1961(5), because they arose out of a single criminal episode. The court of appeals rejected that argument, concluding that "[p]ossessing and importing marijuana are two separate crimes and consequently two separate acts

for purposes of the RICO statute.” 742 F.2d at 1360-1361. Petitioner sought review of that ruling in a petition for a writ of certiorari, and this Court denied the petition. 472 U.S. 1017 (1985).

3. On September 19, 1985, petitioner moved in district court to vacate his sentence under 28 U.S.C. 2255, arguing once again that the evidence failed to establish that he had engaged in a “pattern of racketeering activity.” The district court denied the motion on the ground that the court of appeals’ earlier rejection of the claim precluded collateral review. Pet. App. 13a-14a. On appeal, the court of appeals found “no error in this reasoning.” *Id.* at 14a. The court of appeals rejected the contention that it should reconsider its previous ruling in light of a footnote in this Court’s intervening decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985). The court of appeals explained that the pertinent language in *Sedima* “does not necessarily change this circuit’s rule, as applied in [petitioner’s] direct appeal, that two separate crimes clearly constitute two separate acts for purposes of RICO.” Pet. App. 15a n.2. Petitioner again petitioned this Court for a writ of certiorari. This time, the Court granted the petition, vacated the court of appeals’ judgment, and remanded the case for reconsideration in light of *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989).

4. On remand, the court of appeals affirmed the denial of petitioner’s Section 2255 motion. Pet. App. 1a-9a. The court stated that, under *H.J. Inc.*, the predicate acts of racketeering underlying a RICO charge must demonstrate continuity or a threat of continuity in order to establish the element of a “pattern of racketeering activity.” Pet. App. 6a-7a. The court explained that the requirement of continuity

may be established in either or both of two ways: “[t]he predicate acts themselves may involve a threat of long-term racketeering activity,” or “the predicate acts [may be] part of an organizational entity’s regular way of doing business.” *Id.* at 7a-8a. The court then concluded that the evidence against petitioner demonstrated the requisite continuity, explaining that petitioner engaged in a “series of acts, including a demand for repayment of a large sum of money or delivery of marijuana to replace the load lost on the Constellation, which ‘by its nature project[ed] into the future with a threat of repetition.’” *Id.* at 8a (quoting *H.J. Inc.*, 109 S. Ct. at 2902).¹ The court added that, in light of that evidence, it did “not need to consider the great range of long-term activities of the organization, embracing massive movements of marijuana into Florida and Georgia by ship and plane over an extended period of time, in some of which activities [petitioner] was involved.” Pet. App. 9a n.1.

¹ Petitioner notes that the court of appeals erred in suggesting that that petitioner told Cobb that Cobb should either return his \$1,500,000 downpayment or produce the marijuana after the Constellation shipment had been seized. Pet. 9 n.*. He does not dispute, however, that he made that demand earlier—in fact, on the day the shipment was to arrive. See Gov’t C.A. Br. 29. The government’s evidence showed that petitioner’s interest in the return of his downpayment was related to his possible participation in another drug transaction and, accordingly, that the Constellation load was not an isolated venture. See Gov’t C.A. Br. 27-30.

ARGUMENT

Petitioner contends that the predicate offenses underlying his RICO conviction failed to demonstrate the continuity required by *H.J. Inc.* for a "pattern of racketeering activity." The requisite pattern was absent, he argues, because the two predicate offenses—the importation of the marijuana aboard the *Constellation* and the possession of that load of marijuana with the intent to distribute it—arose out of a single shipment of marijuana. Pet. 14-28. Petitioner also maintains that the court of appeals erroneously referred to events "external" to those predicate offenses in finding a pattern. Pet. 28-39.

1. Under RICO, the term "racketeering activity" is defined to include (A) an act or threat involving various offenses which are punishable as felonies under state law; (B) an act indictable under specified federal criminal statutes; (C) "any offense" involving (among others) "the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable" under federal law; and (D) any act punishable under the Currency and Foreign Transactions Reporting Act. 18 U.S.C. 1961(1). A "pattern of racketeering activity" requires "at least two acts of racketeering activity * * *." 18 U.S.C. 1961(5). In *H.J. Inc.*, this Court noted that "while two acts are necessary [for a pattern], they may not be sufficient." 109 S. Ct. at 2899 (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985)). In order to establish a pattern, the government must show "that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." 109 S. Ct. at 2900.

In this case, the two predicates on which petitioner's RICO conviction was based were two offenses arising from petitioner's involvement in the February shipment of marijuana—specifically, the possession with intent to distribute and the importation of that shipment. Petitioner contends that further review is warranted to determine whether these predicates satisfy the “continuity” requirement set forth in *H.J. Inc.*—as he puts it, “whether the temporal concept of ‘continuity’ requires a separation in time between the predicate acts, or whether this requirement can be met by a single episode, fractionated into multiple RICO predicate crimes, which pose a threat of reoccurrence.” Pet. 16.

In *H.J. Inc.*, the Court stated that “[t]o establish a RICO pattern it must * * * be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity.” 109 S. Ct. at 2901. “What a * * * prosecutor must prove is continuity of racketeering activity, or its threat, *simpliciter*.” *Ibid.* While it observed that the continuity requirement could be satisfied “in a variety of ways, thus making it difficult to formulate in the abstract any general test for continuity,” the Court identified certain showings that would (and would not) suffice. The Court noted that predicate acts “extending over a few weeks or months do not satisfy this requirement” unless “the *threat* of continuity is demonstrated.” *Id.* at 2902. The Court explained, that a threat of continuity would be established “if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit.” *Ibid.* “In other cases,” the Court continued, “the threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing en-

tity's regular way of doing business." *Ibid.* Likewise, "the threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes." *Ibid.*

Petitioner's predicate offenses satisfied the test for continuity, because they "constitute[d] a threat of *continuing* racketeering activity." *H.J. Inc.*, 109 S. Ct. at 2901. That threat was inherent both in the predicate acts themselves and in their relationship to the ongoing drug trafficking enterprise in which petitioner participated. The predicate acts consisted of the importation and possession with intent to distribute of 25,795 pounds of marijuana. The importation of such a massive amount of marijuana carries the inherent threat of future criminal activity—namely, the distribution of the marijuana to other purchasers who would in turn distribute the marijuana to their customers, either lower-level dealers or users.

In addition, the predicate acts in this case were committed in furtherance of an ongoing drug-trafficking enterprise that over a five-year period smuggled massive loads of marijuana into Georgia and North Carolina. As "preferred customers," petitioner and Waldrop purchased marijuana from the organization on 25 to 30 separate occasions. Accordingly, this is a classic case of predicate acts being committed as part of a long-term association existing solely for criminal purposes. Under *H.J. Inc.*, the threat of continuity inheres in these circumstances.

Petitioner contends that further review is warranted to resolve a conflict between the court of appeals' decision in this case and the decisions in *United States v. Kragness*, 830 F.2d 842 (8th Cir.

1987), and *United States v. Walgren*, 885 F.2d 1417 (9th Cir. 1989). Pet. 16. We disagree. In *Kragness*, the court held that the offenses of importing marijuana and possessing marijuana with intent to distribute it did not constitute a pattern of racketeering activity in a case in which they arose out of a single shipment of marijuana into the United States. The court explained that the requirement of "continuity plus relationship" was not established in that situation. 830 F.2d at 860-861. *Kragness*, however, predated this Court's decision in *H.J. Inc.* and thus did not consider whether two predicate offenses arising out of a single criminal episode may constitute a pattern by virtue of their creation of a long-term threat of racketeering activity.²

In *Walgren*, the court of appeals vacated the defendant's conviction on a mail fraud count on the

² Although the RICO statute does not require it, the Department of Justice has established a policy against charging multiple predicate criminal acts based on a single episode of criminal conduct. As the *Kragness* court observed (830 F.2d at 861), charging marijuana possession and importation offenses as separate acts of racketeering when they arise from a single criminal transaction is contrary to that policy. The treatment of the possession and importation offenses in *Kragness* as separate predicate offenses was apparently the result of an error in the prosecutor's interpretation of the terms under which the prosecution in that case was authorized. We are advised that, as a result of *Kragness*, the Organized Crime and Racketeering Section of the Department's Criminal Division, which is responsible for reviewing and authorizing all RICO prosecutions, has taken steps to make the terms of its approval more explicit with respect to the Department's policy against charging as separate acts multiple offenses that arise out of a single criminal episode. For that reason, we do not anticipate that the problem presented by the *Kragness* case—and in a different form by the present case—will recur in RICO prosecutions in the future.

authority of *McNally v. United States*, 483 U.S. 350 (1987), and thus eliminated that offense as a predicate for the defendant's RICO conviction. The defendant argued that since there was only one remaining predicate offense alleged in the RICO count (a violation of the Travel Act based upon a single telephone call), the RICO conviction should be reversed as well. In response, the government suggested that the defendant's conviction on the Travel Act count was necessarily based on a finding that the defendant had committed state law extortion and bribery in the course of the telephone call. Relying on *Kragness*, the court of appeals rejected that argument. 885 F.2d at 1426.³ There is nothing in the court's opinion, however, to suggest that the predicate activity presented a threat of continuity, as did the predicate activity at issue here. Moreover, unlike *Walgren*, this is not a case in which the government sought to split a single alleged predicate offense into two separate offenses after a conviction had been obtained.⁴

³ There is no conflict between *Walgren* and *United States v. Kaplan*, 886 F.2d 536 (2d Cir. 1989), cert. denied, 110 S. Ct. 1127 (1990). In *Kaplan*, the defendant offered to furnish bribes to two individuals in the course of a conversation with one of them. The Second Circuit found that the two bribe offers were separate predicate offenses because they were intended for different individuals who were being called upon to perform different functions in return for the bribes. See 886 F.2d at 542. By contrast, in *Walgren* the government argued that a state legislator, in the course of a single conversation with an FBI agent posing as a businessman, committed both bribery and extortion. See 885 F.2d at 1425.

⁴ The Sixth Circuit's decision in *United States v. Jennings*, 842 F.2d 159 (1988), is entirely inapposite. The court in that case held that two predicate acts could be charged in a single count, but that the government had failed to prove the defendant was guilty of the second predicate act. *Id.* at 162-163.

2. Petitioner complains that a finding of a “pattern of racketeering activity” may not rest on facts external to the alleged predicate offenses, and that upholding his conviction on that basis would contradict the indictment and the jury instructions. For several reasons, these contentions do not warrant further review.

At the outset, petitioner failed to raise these issues in the court of appeals, and therefore he may not assert them in this Court. See *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Moreover, the court of appeals did not uphold the conviction on the basis of activities external to the predicate offenses themselves. Pet. App. 9a n.1. As we have shown, the predicate offenses on which petitioner’s conviction was based—which involved the importation and possession of a massive amount of marijuana—inherently carried the threat of continued drug-trafficking activity and thus themselves satisfied the continuity requirement outlined in *H.J. Inc.*

In any event, we submit that there is nothing wrong with considering the evidence that the shipment that was the subject of the two predicate offenses was part of an ongoing drug-trafficking operation. Contrary to petitioner’s contention (Pet. 30-31), nothing in *H.J. Inc.* forecloses such an approach. To the contrary, the Court’s opinion in *H.J. Inc.* contemplates that the element of continuity can be established by proof not only of the predicate offenses themselves, but also of the defendant’s ongoing activities. A showing that “predicate acts or offenses are part of an ongoing entity’s regular way of doing business”—or that the predicate offenses “can be attributed to a defendant operating as part of a long-

term association that exists for criminal purposes"—necessarily entails some proof that the defendant has operated as part of an association existing for criminal purposes and that the predicate offenses are part of its regular way of doing business. See 109 S.Ct. at 2902. There is no conflict among the courts of appeals on this issue.

Neither the indictment nor the jury instructions would preclude upholding petitioner's conviction on this theory—*i.e.*, that the evidence was sufficient to establish that his predicate offenses were part of the regular way of doing business of the enterprise with which petitioner associated. The indictment notified petitioner that he would face proof that he was associated with an ongoing criminal organization and that he committed the alleged predicate offenses in furtherance of that association. Similarly, the district court's instructions adequately informed the jury that, in order to convict petitioner on the RICO charges, it had to find that he had committed two predicate offenses that were part of a pattern. 44 R. 31; see 44 R. 29. Although the Court's instructions stated that the only predicate offenses being submitted to the jury with respect to petitioner were the offenses of aiding and abetting the importation of the marijuana aboard the *Constellation* and aiding and abetting the possession of that marijuana with intent to distribute it (44 R. 39), the instructions quite properly did not limit the evidence that the jury might consider in determining whether these predicate offenses constituted a "pattern of racketeering activity." There is no merit, therefore, to petitioner's contention that the instructions "expressly barred consideration of any activity beyond the two marijuana-related predicates" (Pet. 36). Upholding petitioner's conviction on the basis of a

theory that this Court expressly approved in *H.J. Inc.* therefore would not contradict the jury instructions or constructively amend the indictment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

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